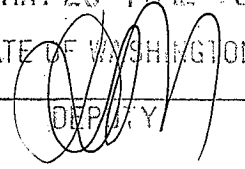


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DIVISION II

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STATE OF WASHINGTON
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No. 36492-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the detention of

Jake Hawkins,

Appellant.

Lewis County Superior Court

Cause No. 06-2-00225-1

The Honorable Judge H. John Hall

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by ordering Mr. Hawkins to submit to a sexual history polygraph prior to trial.
2. The trial court lacked statutory authority to order Mr. Hawkins to submit to a sexual history polygraph prior to trial.
3. The trial judge erred by adopting Finding of Fact No. 1, which reads:
The Respondent should be compelled to participate in a sexual history polygraph as part of the psychological evaluation of the Respondent mandated by RCW 71.09.040(4).
CP 6.
4. The trial judge erred by adopting Finding of Fact No. 2, which reads:
The polygraph should be limited to a sexual history polygraph.
CP 6.
5. The trial judge erred by adopting Finding of Fact No. 3, which reads:
The Control Question Technique, as described in the Declaration of Rick Minnich, is the proper polygraph technique to be employed.
CP 6.
6. The Department exceeded its authority when it promulgated WAC 388-088-034, requiring SVP evaluations to include polygraph testing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 71.09, which curtails civil rights, must be strictly construed to its terms. The statute does not expressly authorize a trial judge to order a polygraph examination prior to trial. Did the trial judge exceed his authority by ordering Mr. Hawkins to submit to a sexual history polygraph prior to trial? Assignments of Error Nos. 1-5.

2. Agencies may exercise only those powers conferred on them expressly or by necessary implication. RCW 71.09 does not expressly authorize the Department impose requirements for SVP evaluations. Nor are such regulations necessary to implement RCW 71.09. Did the Department exceed its authority by promulgating regulations requiring polygraph testing as part of SVP evaluations? Assignments of Error Nos. 1-5.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While in custody of the Department of Corrections, Jake Hawkins successfully completed a 13-month sex offender treatment program. RP (2/23/06) 8, 10, 15-17. Prior to his release, the state filed a Petition seeking Jake Hawkins's involuntary commitment as a sexually violent predator. CP 8-9. Dr. Chris North had completed a psychological evaluation of Mr. Hawkins more than a year earlier. RP (2/23/06) 7.

While the Petition was pending, the state sought an order for Mr. Hawkins to complete a sexual history polygraph examination. Mr. Hawkins objected. Supp. CP, Petitioner's Motion Compelling Polygraph Examination; RP (5/10/07) 43-48. The trial court ruled that the examination was required and entered an Order Compelling Polygraph, which included the following findings of fact:

1. The Respondent should be compelled to participate in a sexual history polygraph as part of the psychological evaluation of the Respondent mandated by RCW 71.09.040(4).
2. The polygraph should be limited to a sexual history polygraph.
3. The Control Question Technique, as described in the Declaration of Rick Minnich, is the proper polygraph technique to be employed.

CP 6-7.

Mr. Hawkins sought and was granted discretionary review.¹

ARGUMENT

I. THE ORDER COMPELLING MR. HAWKINS TO SUBMIT TO A SEXUAL HISTORY POLYGRAPH VIOLATES RCW 71.09.040.

RCW 71.09 must be strictly construed to its terms, because it curtails civil rights. *In re Detention of Martin*, Slip Opinion (No. 78963-1) p. 7, ___ Wn.2d ___, ___ P.3d ___ (2008). Civil incarceration achieved by means other than strict compliance with the procedures set forth in RCW 71.09 deprives a person of liberty without due process of law, in violation of the federal and state constitutions. *Martin*, at 11-12; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3.

RCW 71.09 does not contain any provision requiring a respondent to undergo polygraph testing prior to trial. Although RCW 71.09.040 directs the trial court to order an evaluation, it does not make any reference to polygraph testing as part of that evaluation. By contrast, RCW 71.09.096(4) *does* require an adjudicated sexually violent predator to submit to polygraph testing (if recommended) as a condition of release to a less restrictive alternative:

¹ The Commissioner initially denied the request, but later the Petitioner's Motion to Modify was granted.

Prior to authorizing any release to a less restrictive alternative, the court shall impose such conditions upon the person as are necessary to ensure the safety of the community. The court shall order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court. These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment *that may include monitoring by the use of polygraph and plethysmograph*, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others. A copy of the conditions of release shall be given to the person and to any designated service providers.
RCW 71.09.096(4), *emphasis added*.

Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463 at 475-476, 98 P.3d 795 (2004). Applying the maxim *expressio unius est exclusio alterius* and this Court's duty to strictly construe statutes curtailing civil liberties, RCW 71.09 must be interpreted to preclude the trial court from ordering Mr. Hawkins to submit to a polygraph prior to trial. *Martin, supra*, at 9.

Accordingly, the Order Compelling Polygraph Examination must be vacated.

II. THE DEPARTMENT EXCEEDED ITS AUTHORITY BY REQUIRING SVP RESPONDENTS TO SUBMIT TO POLYGRAPH TESTING.

Agencies may only exercise “those powers conferred on them expressly or by necessary implication.” *Impoundment of Chevrolet Truck*, 148 Wn.2d 145 at 156, 60 P.3d 53 (2002), *internal quotation marks and citations omitted*). If a statute does not authorize a particular regulation, either expressly or by necessary implication, that regulation is invalid “despite its practical necessity or appropriateness.” *Chevrolet Truck*, at 156-157, *internal quotation marks and citations omitted*.

The legislature did not grant the Department authority to promulgate regulations requiring SVP respondents to submit to polygraphs. RCW 71.09.040(4) directs the Department to develop rules, in consultation with the Department of Health and the Department of Corrections, for establishing the qualifications of persons selected to evaluate respondents; however, the statute does not direct or authorize the Department to establish rules for the conduct of evaluations ordered under RCW 71.09.040. Nor does the statute permit the Department to require SVP respondents to submit to polygraph testing. *Cf.* RCW 71.09.096. Again, under *expressio unius est exclusio alterius*, the Department exceeded its statutory authority by promulgating WAC 388-880-035, the regulation upon which the state relied in the trial court. Supp. CP.

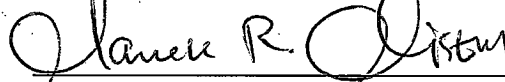
Because RCW 71.09 does not authorize the Department to require SVP evaluations to include polygraphs, the trial court's order cannot be sustained on the basis of WAC 388-088-034.

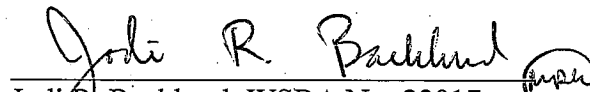
CONCLUSION

Because the sexually violent predator statute curtails civil liberties, it must be strictly construed to its terms. Since RCW 71.09 does not authorize either trial courts or the Department to require polygraph testing, the court's Order Compelling Polygraph Examination must be vacated.²

Respectfully submitted on May 24, 2008.

BACKLUND AND MISTRY


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² The pleadings also establish that the state violated RCW 71.09.040 by obtaining a pre-filing evaluation of Mr. Hawkins, in the absence of a judicial determination of probable cause. This issue will undoubtedly be resolved in the trial court.

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jake Hawkins
McNeil Island Corrections Center
35 Settler St.
P.O. Box 88100
Steilacoom, WA 98388-0900

and to:

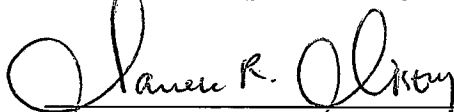
Attorney General's Office
800 – 5th Avenue, Suite 2000
Seattle, WA 98104-3188

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 24, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on May 24, 2008.

A handwritten signature in cursive script, appearing to read "Manek R. Mistry", is written over a horizontal line.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant